Supreme Court, U.S.
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No. 88-977

In The

Supreme Court of the United States

October Term, 1988

COLORADO-UTE ELECTRIC ASSOCIATION, INC., et al.,

Appellants,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO, et al.,

Appellees.

On Appeal From The Supreme Court Of Colorado

MOTION TO DISMISS OR AFFIRM

ROBERT J. KAPELKE
(Counsel of Record)

PAULA M. CONNELLY

GORSUCH, KIRGIS, CAMPBELL,
WALKER AND GROVER
1401 - 17th Street, Suite 1100
P.O. Box 17180 T.A.
Denver, Colorado 80217
(303) 534-1200

Attorneys for Appellee Empire Electric Association, Inc.

February 14, 1989

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QUESTIONS PRESENTED

The questions presented by this Motion to Dismiss or Affirm are:

1. Whether Appellants have raised substantial federal questions under the Supremacy Clause or the Commerce Clause that have not already been decided by this Court in *Arkansas Electric Cooperative Corporation v. Arkansas Public Service Commission*, 461 U.S. 375 (1983), given the virtual identity of the facts between the two cases and [illegible]n express statements by the Rural Electrification Administration declining the request that it intervene in opposition to the Colorado Public Utilities Commission order; and

2. Whether Appellants have raised a substantial federal question with respect to procedural due process about lack of access to computer codes when Appellants testified at the Commission hearing that sufficient information had been given them with regard to the computer analysis and Appellants chose, as a matter of trial strategy, to forego cross-examination on the issue; and

3. Whether this Court has jurisdiction over either question raised by Appellants when neither was presented to the Colorado Supreme Court until the filing of petitions for rehearing and the court did not grant rehearing.

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Appellee Empire Electric Association, Inc.[1] ("Empire Electric") moves the Court for an order affirming the judgment of the Colorado Supreme Court on the grounds that is it manifest that the questions on which decision of the cause depends are so unsubstantial as to need no further argument. Empire Electric further moves the Court for an order dismissing the appeal on the grounds that the Court lacks jurisdiction because the federal questions sought to be reviewed were not timely or properly raised and were not expressly passed on by the Colorado Supreme Court.

STATEMENT OF FACTS

Empire Electric is a rural electric cooperative and public utility engaged in the business of transmitting, distributing and selling electric power at retail to ultimate consumers. Empire Electric directly owns no electric generation facilities. With several other Colorado rural electric cooperatives, Empire Electric formed a generation

[1] Empire Electric Association, Inc. is a member of Appellant Colorado-Ute Electric Association, Inc. The other thirteen members of Colorado-Ute Electric Association, Inc. are Appellants Delta-Montrose Electric Association; Grand Valley Rural Power Lines, Inc.; Gunnison County Electric Association, Inc.; Holy Cross Electric Association, Inc.; Intermountain Rural Electric Association; La Plata Electric Association, Inc.; Sangre de Cristo Electric Association, Inc.; San Isabel Electric Association, Inc.; San Luis Valley Rural Electric Cooperative, Inc.; San Miguel Power Association, Inc.; Southeast Colorado Power Association; White River Electric Association, Inc.; and Yampa Valley Electric Association, Inc. There are no other companies or entities with which Empire Electric is affiliated.

and transmission electric cooperative – Colorado-Ute Electric Association, Inc. ("Colorado-Ute") – to provide wholesale power to Empire Electric and the other member cooperatives. Today there are fourteen rural electric cooperatives that are members of the Colorado-Ute cooperative. Empire Electric purchases all its electric power at wholesale from Colorado-Ute under an "all requirements" contract and resells that power at retail to consumers in Empire Electric's certificated territories in Colorado and Utah. Empire Electric serves approximately 9,500 consumers in Colorado and approximately 1,000 consumers in Utah.

Empire Electric was aligned before the Colorado Supreme Court with Colorado-Ute and the other thirteen members of Colorado-Ute, all of which are Appellants in this Court. For the reasons set forth in this Motion, Empire Electric supports the Public Utilities Commission of the State of Colorado ("Colorado PUC" or "Commission") and other Appellees in the position that the appeal of Colorado-Ute *et al.* is groundless and should be dismissed by this Court.

This case concerns whether a state regulatory commission can constitutionally require Colorado-Ute to change its rate structure for wholesale power sold its member cooperatives from a uniform flat energy rate to a demand energy rate.[2] Empire Electric accepts the facts set

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[2] A uniform flat energy rate recovers all costs of generation and transmission through a uniform charge per kilowatt hour. A demand energy rate is a two-part rate which recovers fixed capital costs through demand charges based upon maximum kilowatt demand, and recovers variable operation and

(Continued on following page)

forth in the Statement of the Case in Appellants' Jurisdictional Statement. To these facts, however, must be added important factual developments that have occurred subsequent to the issuance of the Colorado Supreme Court decision that is the subject of this appeal.

After its defeat before the Colorado Supreme Court, Colorado-Ute, by letter, requested the United States Rural Electrification Administration ("REA") to intercede with the Colorado PUC to permit Colorado-Ute to retain its flat energy rate. By letter dated August 12, 1988, Martin G. Seipel, Director Southwest Area – Electric of the Rural Electrification Administration, turned down Colorado-Ute's request. In that correspondence, REA stated that it generally did not interfere with state commission regulatory decisions unless there were some evidence that REA's loan security would be endangered. The REA also informed Colorado-Ute that while it had no objection to Colorado-Ute's flat energy rate, the REA also had no objection to demand energy rates. The REA stated that demand energy rates are "used almost universally by REA power supply borrowers and investor-owned utilities." (App. 1-2).

Colorado-Ute again requested REA to step in and intercede before the Colorado PUC and before the United States Supreme Court with respect to the Commission-ordered demand energy rate structure. By letter dated

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(Continued from previous page)

maintenance expenses, including fuel costs, through energy charges based on kilowatt hour usage. See footnotes 1 and 3 to the Opinion of the Colorado Supreme Court (Appellants' A-48).

November 14, 1988 to Roderick D. Myers, Chairman of the Board of Colorado-Ute, Mr. Seipel reiterated that REA had no basis to intervene in the matter of the Commission's order requiring Colorado-Ute to adopt a seasonally-differentiated demand energy rate. (App. 4). These letters are set forth in full in the Appendix to this Motion to Dismiss or Affirm.

A flat energy rate had been approved for the first time by the Commission for Colorado-Ute's wholesale sales to its member cooperatives in February, 1981. Before that time, Colorado-Ute used a demand energy rate structure for its wholesale rates to its members. Several of the members of Colorado-Ute, including Empire Electric, use the demand energy rate structure in providing retail service to large electric customers. Utilities with which Colorado-Ute exchanges wholesale power also use demand energy rates.

ARGUMENT

I. THE CONSTITUTIONALITY OF STATE COMMISSION JURISDICTION OVER THE WHOLESALE RATES OF A GENERATION AND TRANSMISSION COOPERATIVE SUCH AS APPELLANT COLORADO-UTE HAS BEEN AFFIRMED BY THIS COURT. APPELLANTS' CHALLENGE IS SO UNSUBSTANTIAL AS TO NEED NO FURTHER ARGUMENT.

In *Arkansas Electric Cooperative Corporation v. Arkansas Public Service Commission*, 461 U.S. 375 (1983), this Court upheld state commission jurisdiction over the wholesale

rates charged by a generation and transmission cooperative to its member retail rural electric cooperatives. In that case, the generation and transmission cooperative – Arkansas Electric Cooperative Corporation ("AECC") – was established with loan funds and technical assistance provided by the REA. AECC sold electric power at wholesale to its seventeen member rural electric cooperatives, which in turn resold the power to ultimate consumers. AECC sold most of what it generated to its member cooperatives, but AECC also engaged in interstate wholesale transactions over a multistate transmission grid with other electric utilities. AECC participated in a variety of sale and exchange agreements with other wholesale electric suppliers, buying and selling power as needed.

This Court ruled that the Arkansas Public Service Commission could constitutionally assert jurisdiction over the wholesale rates charged by AECC to its member cooperatives. State Commission jurisdiction was not preempted by either the Federal Power Act, 16 U.S.C. § 824(b), or the federal Rural Electrification Act, 7 U.S.C. § 901, *et seq.* Nor was state commission jurisdiction precluded by the Commerce Clause in Article I, § 8, cl. 3 of the United States Constitution. Applying the *Bruce Church* test,[3] this Court held that state regulation of wholesale rates charged by AECC to its members is well within the scope of legitimate local public interests because AECC's "basic operation consists of supplying power

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[3] In *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), the Court formulated a test to determine when state regulation would be held unconstitutional under the Commerce Clause.

from generating facilities located within the State to member cooperatives, all of which are located within the State." *Id.* at 394. The fact that AECC purchased and sold wholesale power over the interstate grid was not considered sufficient to constitutionally preclude state regulation of wholesale transactions with member cooperatives within the state.

In this appeal, Colorado-Ute and thirteen of its member cooperatives argue that the Colorado Public Utilities Commission had no jurisdiction over the structure of the wholesale rates charged by Colorado-Ute to its member cooperatives. The factual predicate for Colorado PUC jurisdiction over Colorado-Ute's wholesale rates is virtually identical with the basis for Arkansas Public Service Commission jurisdiction over AECC. As set forth in Appellants' Jurisdictional Statement, Colorado-Ute is a rural electric cooperative association that generates, transmits and sells electric power at wholesale to its fourteen member rural electric cooperatives. Colorado-Ute obtains most of its bulk power from power plants in Colorado that it wholly or partially owns. It transmits and delivers the power in Colorado to its fourteen members. Colorado-Ute also engages in wholesale transactions over interstate grids with other utilities. Colorado-Ute has loans from REA; its facilities and operations are subject to restrictions contained in mortgages from REA.

Appellants agree that *Arkansas Electric* governs the issue of Colorado PUC jurisdiction over Colorado-Ute's wholesale rates. Appellants make no attempt to distinguish the Colorado-Ute business operations from those aspects of the AECC operations that are pertinent to the

issue of state utility commission jurisdiction. Instead, accepting this Court's analysis in *Arkansas Electric* as a given, Appellants argue that this case requires the Court to "refine" its analysis in *Arkansas Electric*. In essence, Appellants argue that the demand energy rate structure[4] ordered by the Colorado PUC has been directly or inferentially preempted by recent actions taken by REA with respect to two other cooperative utilities in two other states. Appellants call on the Court to declare that these REA actions preempt Colorado PUC jurisdiction that otherwise would be considered valid under the *Arkansas Electric* analysis.

This Court need not decide whether the REA actions taken with respect to Wabash Valley Power Association, Inc. in Indiana and Michigan or with respect to Big Rivers Electric Corporation in Kentucky would require a refinement of this Court's reasoning in *Arkansas Electric*. Those actions are not before the Court in this appeal. The issue in this appeal is whether REA intends to preempt the Colorado PUC's order that Colorado-Ute must employ a demand energy rate structure. It is clear that REA does *not* intend to assert any such preemption.

In the Appendix to this Motion are two letters from REA to Colorado-Ute that are dated subsequent to the order of the Colorado Supreme Court that is the subject of this appeal. These letters specifically state that REA

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[4] Appellants take no issue with the overall rate increase (i.e., the total authorized revenue) awarded Colorado-Ute by the Colorado PUC. Appellants' preemption arguments are directed solely to rate structure.

does not intend to take a position on demand energy rates contrary to that taken by the Colorado PUC. In the August 12, 1988 letter from Martin Seipel, Director, Southwest Area-Electric, Rural Electrification Administration to Girts Krumins, President, Colorado-Ute, Mr. Seipel acknowledges a request from Colorado-Ute that REA "intercede with the [Colorado Public Utilities] Commission toward the end of permitting Colorado-Ute to retain its current uniform wholesale energy rate." After stating that REA generally does not interfere with state regulatory authority decisions unless REA's loan security is endangered, Mr. Seipel informed Colorado-Ute as follows:

> Our main responsibility is that any rate structure approved by a state commission is equitable to members of a power supply borrower and sufficient to enable the borrower to repay all indebtedness and provide a reasonable margin. While REA found that Colorado-Ute's energy rate met this criteria, *Colorado-Ute and its members should recognize that demand-energy rates, which are used almost universally by REA power supply borrowers and investor-owned utilities, also satisfy this criteria.* [Emphasis supplied]

(App. 1-2).

Again, on November 14, 1988, Mr. Seipel, in a letter to Roderick D. Myers, Chairman of the Board of Colorado-Ute, emphatically stated:

> As we have previously indicated, REA believes that there is no basis to intervene in the matter of the Commission's order requiring Colorado-Ute to adopt a seasonally-differentiated demand energy rate.

(App. 4).

No further argument on direct or inferred REA preemption of the Colorado PUC demand energy rate order is required.

Appellants also argue that the PUC rate order creates a burden on interstate commerce, implying that application of the *Bruce Church* test in this case would find the Colorado PUC demand energy rate order constitutionally impermissible. The purported impacts on interstate commerce are detailed by Appellants in their footnote 11. This argument simply lacks merit.

As indicated above in the REA letters, demand energy rates are almost universally used by cooperative and investor-owned utilities, including the utilities with which Colorado-Ute exchanges power over interstate grids. No excessive burden on interstate commerce is created by a Colorado PUC order requiring Colorado-Ute to use this standard rate structure. Moreover, the wholesale rate structure at issue involves only the wholesale rates charged by Colorado-Ute to its members, all of which purchase power in Colorado and resell the power primarily in Colorado.[5] This fact situation is virtually identical with the fact pattern in *Arkansas Electric* that led this Court to the conclusion that there was no excessive burden placed on interstate commerce by state regulation of the wholesale rate. Other electric rates which Appellants claim create interstate commerce impacts (interruptible rates charged by Colorado-Ute members to retail

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[5] Empire Electric and many other Colorado-Ute members use a demand energy rate structure for retail service provided to larger customers.

customers, wheeling rates charged other utilities by Colorado-Ute, and rates for purchases from qualifying facilities) were not at issue in the Colorado PUC proceeding giving rise to this appeal.

The facts in this appeal are virtually on "all fours" with the facts in the *Arkansas Electric* decision. No REA preemption will be asserted. There is no need to "refine" *Arkansas Electric*. The decision of the Colorado Supreme Court should be summarily affirmed, or alternatively, this appeal should be dismissed because it fails to present any substantial federal question.

II. APPELLANTS' DUE PROCESS CHALLENGE ON THE FAILURE TO PROVIDE COMPUTER CODES IS SO UNSUBSTANTIAL AS TO NEED NO FURTHER ARGUMENT.

Appellants claim they were denied due process in the Commission hearing because they were denied access to proprietary computer codes, program plans, program manuals and input and output modules. The Commission made the following findings concerning this matter in its Decision No. C83-1392 (September 7, 1983):

> Third, Colorado-Ute argues a due process violation on the basis of the Staff's refusal to provide Colorado-Ute with a copy of the WASP-82 analysis which, according to Colorado-Ute, foreclosed it "any opportunity to effectively cross-examine Staff witness Wendling." In fact, as Colorado-Ute knows, the record clearly establishes that the Commission went out of its way to accommodate Colorado-Ute's concerns in this regard by encouraging a full exchange of information between the Staff and Colorado-Ute relative to the WASP-82 program, subject to the proprietary nature thereof. The Commission has reviewed

> the transcripts of this proceeding, and especially those portions relating to the dialogue between the Staff, Colorado-Ute, and the Commission relating to the WASP-82 program. The bottom line is that Colorado-Ute employee Raymond Keith, on the record, was explicitly asked by the Chairwoman of the Commission "Is that (referring to the information to be supplied by the Staff of the Commission to Colorado-Ute) going to give you sufficient time to analyze and do what needs to be done?" Mr. Keith replied: "I believe it will. The only thing I can think of would be some clarification on the part of the print-outs that can be handled by either direct conversation or by telephone, but I don't think I'll need any additional paper prepared."
>
> Colorado-Ute cannot have it both ways. It agreed, on the record, that the information that would be given to it by the Staff would enable it to have sufficient time to analyze and to do what needed to be done. It cannot now claim that it was disadvantaged notwithstanding its counsel's pro forma objection on the record. (See October 26, 1982 transcript, p. 61).

(Appellants' A-144, 145).

The Montrose, Colorado District Court, in reviewing Colorado-Ute's due process objections with respect to the computer evidence, rejected Colorado-Ute's arguments, making the following findings:

> Colorado-Ute next argues that its right to due process under the Fourteenth Amendment to the United States Constitution and under Article II, § 25 of the Colorado Constitution, was violated by admitting testimony based on the WASP-82 computer analysis, and that the Commission violated C.R.S. 1973, 24-72-304 (The Colorado Open Records Act), in refusing to provide Colorado-Ute with a copy of the WASP-82 computer program. The Court rejects this argument advanced by Colorado-Ute. Hearings in

> this case were held before the Commission on seven separate days between October 6, 1982 and ending November 16, 1982. While Colorado-Ute is entitled to due process as set forth in *Mountain States T. and T. Co. v. Department of Labor*, 184 Colo. 334, 520 P.2d 586 (1974), a review of the record discloses that Colorado-Ute did not receive information on the WASP-82 analysis and did sponsor testimony as a result thereof. This matter was discussed at length at the hearing date on October 26, 1982, and again on November 15, 1982. Colorado-Ute erroneously stood on their objection and did not cross-examine Staff witness Mr. Wendling, and did so at their own peril. Based upon the application for re-hearing, the Commission in its Decision No. 1392 addressed this issue on pages 3 and 4 of that Decision, and a review of the record in that regard clearly substantiates the Commission in that regard. The Court therefore finds that the Commission neither violated the Colorado Open Records Act nor Colorado-Ute's right to due process under the Fourteenth Amendment to the U.S. Constitution or Article II, § 25 of the Colorado Constitution.

(Appellants' A-85).

No appeal was taken from this district court ruling. Appellants did not raise this issue before the Colorado Supreme Court until they filed their petitions for rehearing which were summarily denied.

The computer code issue does not give rise to procedural due process concerns but instead reflects a faulty trial strategy on the part of Appellants. A Colorado-Ute employee stated on the record that he had sufficient information to review the computer analysis. The Commission directed its staff to cooperate fully with Colorado-Ute to enable Colorado-Ute to review the computer analysis, subject to protecting information proprietary to the author of the computer software, information that the

Commission staff could not legally disclose. Although given fair opportunity to testify against Commission consideration of the computer analysis and to critique that analysis through cross-examination, Colorado-Ute chose to use the "stonewalling" technique described above by the Commission and the district court. As found by the district court, Colorado-Ute employed this tactic "at their own peril." This possible error of litigation strategy cannot be elevated into a substantial federal question of due process worthy of consideration by this Court.

III. THIS COURT LACKS JURISDICTION OVER THE TWO QUESTIONS RAISED BY APPELLANTS BECAUSE NEITHER QUESTION WAS TIMELY RAISED OR EXPRESSLY PASSED ON BY THE COLORADO SUPREME COURT.

Appellants admit in their Jurisdictional Statement that they did not raise either question presented for appeal before the Colorado Supreme Court until they filed their petitions for rehearing. Under Rule 40(a) of the Colorado Appellate Rules, no answer to a petition for rehearing will be received unless requested by the court. (*See* Colorado PUC App. 16). The Colorado Supreme Court requested no answers to Appellants' petitions for rehearing. The order of the Colorado Supreme Court denying the petition for rehearing read as follows:

> Upon consideration of the Petitions for Rehearing filed in the above cause, and now being sufficiently advised in the premises,
>
> IT IS THIS DATE ORDERED that said Petitions for Rehearing shall be, and the same hereby are, DENIED.

(Appellants' A-153).

It has long been the general rule of this Court that raising a federal question for the first time in a petition for rehearing in the highest state court having jurisdiction to review the question is insufficient to confer jurisdiction on this Court under 28 U.S.C. § 1257(2), unless the highest state court actually entertains the petition and expressly decides the question. *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 128 (1945); *Hanson v. Denckla*, 357 U.S. 235, 243-44 (1958); *Herndon v. Georgia*, 295 U.S. 441, 443 (1935); *American Surety Co. v. Baldwin*, 287 U.S. 156 (1932); *Forbes v. State Council of Virginia*, 216 U.S. 396 (1910); *Simmerman v. Nebraska*, 116 U.S. 54 (1885). The Colorado Supreme Court's summary denial of the petitions for rehearing clearly demonstrates that the Colorado Supreme Court did not expressly decide the federal questions presented in this appeal.

Moreover, Appellants never raised a sufficient Commerce Clause challenge before the Colorado Supreme Court. The petition for rehearing filed by Colorado-Ute makes only a one sentence reference to an undue burden on interstate commerce. With respect to the Supremacy Clause and REA preemption, the preemption issue that was presented to the Colorado Supreme Court was set forth in Colorado-Ute's Petition for Rehearing as follows:

> The Rural Electrification Administration (REA), an agency of the federal government, approved the flat rate proposed by Colorado-Ute. According to Colorado-Ute's mortgage with the United States, the approval of its rates is a prerequisite to their implementation. It is well settled that a state commission may not impose regulations that conflict with those

> promulgated by the REA. *See Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission*, 461 U.S. 375, 103 S. Ct. 1905, 76 L. Ed. 2d 1 (1983). Consequently, the PUC had no right to impose rates on Colorado-Ute inconsistent with those approved by the REA. [Footnotes omitted.]

(Appellants' A-170).

The preemption issue presented to the Colorado Supreme Court was whether the Colorado PUC order conflicted with a Colorado-Ute mortgage requirement. No reference to the direct or inferred preemption argument based upon recent actions of the REA was presented to the Colorado Supreme Court.

Similarly, the computer code issue was not raised by Appellants until their petitions for rehearing. The Colorado Supreme Court did not grant rehearing on this issue.

Consequently, since the Colorado Supreme Court did not expressly pass on the federal issues raised by Appellants in their Jurisdictional Statement, and these issues were not timely presented to the Colorado Supreme Court, this Court lacks jurisdiction to consider these issues.

CONCLUSION

For the reasons set forth above, Appellee Empire Electric Association, Inc. respectfully requests the Court to affirm the decision of the Colorado Supreme Court or, alternatively, to dismiss this appeal.

Respectfully submitted,

ROBERT J. KAPELKE
(Counsel of Record)
PAULA M. CONNELLY
GORSUCH, KIRGIS, CAMPBELL,
WALKER AND GROVER
1401 - 17th Street, Suite 1100
P.O. Box 17180 TA
Denver, Colorado 80217
(303) 534-1200
Attorneys for Appellee Empire Electric Association, Inc.

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United States Department of Agriculture | Rural Electrification Administration | Washington D.C. 20250

Mr. Girts Krumins, President
Colorado-Ute Electric Association, Inc.
P.O. Box 1149
Montrose, Colorado 81402

Aug. 12, 1988

RE: Colorado 46 Ute
Change in Rate Structure

This is in response to your letter dated July 25, 1988, to Mr. Jack Van Mark, advising REA of recent action by the Supreme Court of Colorado which basically affirms a 1983 Colorado Public Utilities Commission (Commission) order, requiring Colorado-Ute to adopt a seasonally-differentiated demand energy rate for its member systems and requesting REA to intercede with the Commission towards the end of permitting Colorado-Ute to retain its current uniform wholesale energy rate. We understand that Colorado-Ute and its members believe that any change to the present form of wholesale rate will adversely impact their operations.

The United States Supreme Court, in its decision of Arkansas Electric Cooperative Corp. v Arkansas Public Utility Commission, 461 U.S. 375, May 16, 1983 took the position that a state may regulate the wholesale rate of an REA borrower where the member systems are all in that state. Historically, REA has taken the position that it does not interfere with state regulatory authority decisions unless REA's loan security is endangered.

Our main responsibility is that any rate structure approved by a state commission is equitable to members

of a power supply borrower and sufficient to enable the borrower to repay all indebtedness and provide a reasonable margin. While REA found that Colorado-Ute's energy rate met this criteria, Colorado-Ute and its members should recognize that demand-energy rates, which are used almost universally by REA power supply borrowers and investor-owned utilities, also satisfy this criteria. Unless REA receives evidence which clearly indicates that the Government's loan security, either to Colorado-Ute or its member systems, is endangered, REA does not intend to take a position which is contrary to the Commission.

Since a number of your member systems have expressed interest in this matter, a copy of this letter is being sent to each of them for their information.

Sincerely,

/s/ Martin G. Seipel
MARTIN G. SEIPEL
Director
Southwest Area - Electric

United States Department of Agriculture | Rural Electrification Administration | Washington D.C. 20250

Mr. Neal E. Stephens, Manager
Empire Electric Association, Inc.
P. O. Drawer K
Cortez, Colorado 81321

Dec. 22, 1988

Dear Mr. Stephens:

This is in response to your letter dated December 16, 1988, requesting correspondence between the Rural Electrification Administration (REA) and Colorado-Ute Electric Association, Inc. (Colorado-Ute), regarding the Colorado Public Utilities Commission's order requiring Colorado-Ute to adopt a seasonally – differentiated demand energy rate. Enclosed is a copy of our letter of November 14, 1988, which is the only such correspondence REA has had with Colorado-Ute since August 12, 1988.

Sincerely,

/s/ Thomas W. Nusbaum
THOMAS W. NUSBAUM
Chief, Operations Branch
Southwest Area - Electric

Mr. Roderick D. Myers
Chairman of the Board
Colorado-Ute Electric
Association, Inc.
P. O. Box 1149
Montrose, Colorado 81402

Nov. 14, 1988

Dear Mr. Myers:

This is in response to Colorado-Ute's letter dated October 14, 1988, requesting that REA reconsider its earlier position and to intercede, in Colorado-Ute's behalf, before the Colorado Public Utilities Commission (Commission), the Federal District Court and the United States Supreme Court in order to allow Colorado-Ute to retain its current uniform wholesale energy rate and to prevent certain wholesale power refunds from being ordered by the Commission. As we have previously indicated, REA believes that there is no basis to intervene in the matter of the Commission's order requiring Colorado-Ute to adopt a seasonally-differentiated demand energy rate.

REA believes that it is premature to consider any action with respect to Colorado-Ute's potential liability resulting from refunds or damages since, at this time, there are no proceedings considering that specific issue. However, we are very interested in Colorado-Ute's financial viability and, at such time as refund proceedings may be initiated, REA would consider making our views known to the Commission.

With respect to the Commission's decision dated August 24, 1988, which is pending further judicial review, we believe that Colorado-Ute should, depending on the decision of the District Court, take immediate action to file with the Commission for increased revenues. We are

aware that the rate level ordered by the Commission dates back to 1983, with two subsequent rate level changes placed into effect since that time. REA has been concerned for quite some time over the fact that Colorado-Ute has been experiencing significant operating losses since 1985. Because of these concerns, REA directed Colorado-Ute, in letters dated November 24, 1986, and December 18, 1986, not to place into effect the 5 percent rate reduction and to design rates to achieve operating results at a level sufficient to meet mortgage requirements. Considering Colorado-Ute's financial position, we believe that Colorado-Ute should file for an immediate rate increase, based on current test year data, sufficient to meet a TIER in excess of 1.0.

Please advise us as to what actions Colorado-Ute intends to take with respect to existing rate levels in light of continuing operating losses and keep us informed as to when hearings for refunds or damages are scheduled to commence.

Sincerely,

/s/ MGS 11/14/88
MARTIN G. SEIPEL
Director
Southwest Area - Electric